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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM—1951

OWEN P. BARNES, JR., AND CHARLES E. MANGIERI,
Petitioners

VS.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 23, 1952, denying a motion for rehearing of judgment entered by said Court on November 13, 1951 (R-794).

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered January 23, 1952 (R-794). The jurisdiction of this Court is invoked under U. S. C., Sec. 1254(1).

Opinions Below

The District Court for the Southern District of Georgia, Savannah Division did not render an opinion. The opinion of the Court of Appeals for the Fifth Circuit is reported in 192 Fed. (2nd) 466. This opinion is incorporated in the record at Pages 788-790.

Questions Presented

1. Whether petitioners Barnes and Mangieri could be convicted of the violation and conspiracy to violate the National Bankruptcy Act by concealing and transferring assets when petitioner Mangieri, trading as M. L. & A. Timbers, was adjudicated a bankrupt, and the evidence discloses that petitioner Barnes was the owner of and in control of M. L. & A. Timbers, and had not been adjudicated a bankrupt.

2. Whether petitioner Barnes and Mangieri could be convicted of the violation and the conspiracy to violate the National Bankruptcy Act by concealing and transferring assets when all acts of transferring alleged took place prior to bankruptcy, and the jury in the trial court found Petitioners not guilty of count alleging concealment of money and assets at time of adjudication of bankruptcy, and at the time the indictment was returned.

Statutes Involved

The pertinent provisions of Title 11, Section 52 and Title 18, Sections 151, 152 and 371, as amended, are set forth in the Appendix.

Statement of Case

The Petitioners, Owen P. Barnes, Jr., and Charles E. Mangieri, were indicted in the Southern District of Georgia,

Savannah Division, and charged in 45 counts with conspiracy to violate and violation of the National Bankruptcy Act (R-65).

The first count of the indictment charged Petitioners with conspiracy to violate the National Bankruptcy Act of which they were found guilty.

Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 40, 42, and 44 charged Petitioner Barnes (R-25-64) with transferring property in contemplation of the bankruptcy of Charles E. Mangieri. Petitioner Barnes was convicted upon each of these counts (R-66).

Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 38, 41, 43 and 45 charged both Petitioners with transferring property to defeat the National Bankruptcy Act (R-26-65). Petitioner Mangieri was found not guilty of all these counts and Petitioner Barnes was found guilty of all counts (R-66).

Counts 30, 32, 34, and 37 charged Petitioner Barnes with concealing assets of Petitioner Mangieri in contemplation of bankruptcy. Petitioner Barnes was convicted upon each of these counts.

Count 36 charged both Petitioners with concealing approximately $41,099.41 of the assets of Charles E. Mangieri from the trustees in bankruptcy. Both Petitioners were acquitted on this count.

Count 39 charged both Petitioners with destroying the records, books and documents relating to the property and affairs of Charles E. Mangieri, in contemplation of his bankruptcy. Both Petitioners were convicted on this count.

To Summarize:

Petitioner Owen P. Barnes, Jr., was convicted upon each count of the indictment, except Count 36 as to which he was acquitted.

Petitioner Charles E. Mangieri was convicted upon Counts 1 and 39, and was acquitted upon all other Counts.

In December, 1946, Petitioner Mangieri and a Mr. Ward entered into the lumber business under the name of "M. L. & A. Timbers" (R-494). However, all the money that went into this business belonged to Petitioner Barnes (R-495). Ward soon withdrew and Petitioner Barnes assumed control and supervision of the operation of M. L. & A. Timbers (R-496). At the time M. L. & A. Timbers was organized, Petitioner Barnes was a stockholder in and managed a corporation, Southern Furniture Specialties, Inc., engaged in manufacturing lumber for furniture dealers (R-491). Soon Southern Furniture Specialties, Inc., passed out of existence (R-508), and M. L. & A. Timbers became a business with Petitioner Barnes in complete control and Petitioner Mangieri working under his direction (R-508).

While Petitioner Mangieri hoped some day to have M. L. & A. Timbers as his own business, it does not appear from the record that he made any decisions or kept up with the business, but merely carried out the directions of Petitioner Barnes (R-624-627).

Prior to the Fall of 1947, M. L. & A. Timbers was becoming increasingly involved in debt. Creditors from whom lumber and other materials had been purchased began pressing for payment of their claims.

An involuntary petition in bankruptcy was filed against Charles E. Mangieri, trading as M. L. & A. Timbers, on

January 23, 1948, and he was adjudicated a bankrupt on February 25, 1948 (R-649).

M. L. & A. Timbers, during the Fall of 1947 and prior to petition in bankruptcy, purchased lumber from various companies on credit and sold said lumber for cash. Some of the creditors from whom lumber was purchased, during this time, have not been paid. The Government contended that Petitioner Barnes, realizing the financial condition of the business, used this means to secure cash with the intentions of withholding it from the creditors. In support of its contention, the Government introduced evidence showing all of the purchases and sales of the business from early Fall until the filing of petition in bankruptcy. The Petitioners countered by showing in detail the expenditures of the monies received and contended they were all for legitimate uses (R-535-550).

On January 17, 1948, there was a fire in the office of M. L. & A. Timbers, which partially destroyed books, records and furniture of the business (R-403-407). There was no competent evidence linking the Petitioners to the fire.

Decisions of the Lower Court

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, affirming the conviction and sentences of the United States District Court for the Southern District of Georgia, appears to be summed up and expressed in the following language . . "In the process of buying on credit, selling for cash, and spending the cash, some creditors were being preferred over others thus defeating the administration of the bankruptcy law." (R-789)

Reasons for Granting the Writ

1. The Circuit Court of Appeads in affirming the conviction and sentences of the Petitioners based upon conspiracy

to violate and violation of the National Bankruptcy Act, by concealing and transferring assets is in conflict with applicable decisions of this Court in that the evidence discloses that the property involved actually belonged to Owen P. Barnes, Jr., and Owen P. Barnes, Jr., has never been adjudicated a bankrupt.

The bankruptcy proceedings involved in this case relate to Charles E. Mangieri as an individual trading as M. L. & A. Timbers. The trustee or receiver in bankruptcy would therefore be entitled to receive and administer only property belonging individually to Charles E. Mangieri.

Under previous decisions the offense of concealing assets under the National Bankruptcy Act must have been accomplished while a person was in bankruptcy, or after his discharge, and hence adjudication of bankruptcy is essential to the commission of the offense (U. SS. vs. Rhodes, 212 F 513; U. S. vs. Young, 170 F 110; Gilberston vs. U. S. 168 F 672).

There must be an actual concealment of property belonging to the estate of the bankrupt, from an officer of the Court charged with the custody or control of the property, after the appointment of such officer (U. S. vs. Cohan, 46 F (2nd) 310; U. S. vs. Grant, 1 F (2nd) 723).

Therefore, since the property of M. L. & A. Timbers was the property individually of Owen P. Barnes, Jr., and since Owen P. Barnes, Jr., has never been declared a bankrupt, the bankrupt estate was not entitled to the property belonging to M. L. & A. Timbers. Hence, it is contended that Petitioners Barnes and Mangieri could not be convicted of conspiracy to violate and violation of the National Bankruptcy Act by transferring or concealing assets of M. L. & A. Timbers.

2. The essence of the indictment as set forth in the 45 counts under which the Petitioners were tried, is concealing and transferring of property and assets in contemplation of bankruptcy. The transfers of property as alleged took place prior to the time that Petitioner Mangieri was adjudicated a bankrupt. In count 36 of the indictment, the Petitioners were alleged to have concealed monies and assets of the bankrupt estate in the sum of $41,099.41, continuously since adjudication of bankruptcy. The jury acquitted both Petitioners on this count. It appears that count 36, and the concealment of $41,099.41 represented the total amount of assets alleged to have been transferred and concealed in other counts of the indictment. The overt acts alleged in the conspiracy count, which was count 1, were substantially the same acts as charged in other separate counts. On the separate counts the jury found Petitioner Mangieri not guilty. It is evident, therefore, that any acts or transfers of property took place prior to bankruptcy, and that Petitioners had no concealed assets at the time Petition in Bankruptcy was filed. It is settled law that any such concealment by a bankrupt must be after the filing of petition against him in order to sustain a conviction of criminal concealment (In re: Agnew 225 F 650). In prosecution for fraudulent concealment of property from trustee in bankruptcy, the burden of proof is upon the Government to show concealment of funds alleged in indictment, and it is essential to show that this concealment continued down to the time trustee was appointed and thereafter with attempt to deprive trustee and creditors of such funds (Noell vs. U. S. 183 F (2nd) 334).

Therefore, since it appears that the transferring of the assets of M. L. & A. Timbers took place prior to Petition in Bankruptcy, and the jury found the Petitioners not guilty of having the monies and assets concealed at the time Petition in Bankruptcy was filed, the Petitioners Barnes and

Mangieri could not be convicted of concealing and transferring assets under the National Bankruptcy Act.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari be granted.

W. M. NICHOLSON
AND
PORTER B. BYRUM
Attorneys for Petitioners

Appendix

The relevant provision of Section 371, Title 18, United States Code, is as follows:

* * * *

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

* * * *

Section 152, Title 18, United States Code, provides:

* * * *

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or . ."

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt or . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 667

OWEN P. BARNES, JR. and CHARLES E. MANGIERI,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 788-790) is reported at 192 F. 2d 466.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1952 (R. 790) and the petition for a rehearing was denied on January 23, 1952 (R. 794). An order of February 20, 1952

by the Chief Justice extended the time for filing a petition for certiorari to March 22, 1952 (R. 794). The petition for a writ of certiorari was filed on March 21, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioners' convictions for conspiracy and substantive violations of the National Bankruptcy Act.

STATUTES INVOLVED

18 U.S.C. [1946 ed.] 88, 35 Stat. 1096 (now in substance 18 U.S.C. 371) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

11 U.S.C. [1946 ed.] 52, 30 Stat. 554, as amended, 52 Stat. 855 (now in substance 18 U.S.C. 152), provided in pertinent part:

> (b) A person shall be punished by imprisonment for a period of not to exceed five

years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this Act, any property belonging to the estate of a bankrupt; * * * or (6) while an agent or officer of any person or corporation, and in contemplation of a proceeding under this Act by or against such person or corporation, or with intent to defeat this Act, concealed or, with or without concealment, transferred any of the property of such person or corporation; or (7) after the filing of a proceeding under this Act or in contemplation thereof, concealed, destroyed, mutilated, falsified, or made a false entry in any document affecting or relating to the property or affairs of a bankrupt; * * *.

STATEMENT

Petitioners, together with other members of their families, were charged under a 45 count indictment (R. 1-65), returned in the United States District Court for the Southern District of Georgia, with conspiracy to violate and with substantive violations of the National Bankruptcy Act. Count 1 charged a conspiracy to violate the bankruptcy laws by fraudulently concealing and trans-

ferring assets of the bankrupt estate of Charles Edward Mangieri, trading as the M.L. & A. Timbers. Counts 2 through 27, 29, 31, 33, 35, 38 and 40 through 45 charged petitioner Barnes and others with fraudulent transfers of the bankrupt's property in violation of 11 U.S.C. [1946 ed.] 52 (b)(6). Counts 28, 30, 32, 34 and 37 charged petitioner Barnes and others with fraudulently concealing the bankrupt's property in violation of 11 U.S.C. [1946 ed.] 52 (b)(6). Count 36 charged both petitioners and others with fraudulently concealing the bankrupt's property from his trustee in violation of 11 U.S.C. [1946 ed.] 52 (b)(1). Count 39 charged both petitioners and others with fraudulently concealing and destroying the bankrupt's records in violation of 11 U.S.C. [1946 ed.] 52 (b)(7).

The jury found petitioner Barnes guilty on each count of the indictment (R. 66-67), except Count 36 under which all of the defendants were acquitted, and the court sentenced him to two years' imprisonment and the payment of a $5,000 fine (R. 70-72). The jury found petitioner Mangieri guilty on Counts 1 and 39 (R. 66-67), and the court sentenced him to imprisonment for one year and one day (R. 67-68). On appeal (R. 72-73) the convictions of the two petitioners were unanimously affirmed (R. 790).[1]

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[1] The court below reversed the conviction of the defendant Owen P. Barnes, Sr. under Count 39 for insufficiency of the evidence (R. 790).

The evidence adduced at the trial may be summarized in pertinent part as follows:

Around December 1946, petitioner Mangieri, with one Ward, began a lumber business at Savannah, Georgia, under the name of M.L. & A. Timbers (hereinafter referred to as MLA) with $10,000 capital loaned by Mangieri's brother-in-law, petitioner Barnes, who had previously operated a furniture manufacturing corporation known as Southern Furniture Specialties, Inc. After Ward's withdrawal from the business, Barnes became the principal supervisor of its operations, making decisions as to what lumber should be purchased and how it should be disposed of, either by manufacture or resale. (R. 491, 494-496, 507, 558, 624.) On June 4, 1947 Mangieri signed an affidavit, filed in the Chatham Superior Court on the next day, stating that he was the sole owner and operator of MLA, and at the trial he testified that this statement was true (R. 88, 627, 650). Even though Mangieri's primary duties were to keep the MLA books, sign checks, and to service as office assistant to Barnes (R. 443, 496, 507, 531, 604), there was evidence that he invested in the business out of his own funds between $12,000 and $15,000, including $5,000 he had borrowed from his father on October 15, 1947 (R. 555, 605-606). Mangieri ordered lumber, and took trips to make collections from purchasers of lumber (R. 124, 182-183, 211, 611). On February 17

and on October 17, 1947 Mangieri gave MLA financial statements to Dunn & Bradstreet representatives (R. 343-347, 351-352, 607, 609). A number of sellers of lumber made shipments to MLA in reliance upon the Dunn & Bradstreet credit ratings (R. 108, 109, 118, 124, 129-130, 146, 153). On one occasion when Barnes directed Mangieri to give a check to a creditor demanding payment, Mangieri admitted, "I can't give a check, I don't have any money in the bank" (R. 455-456).

On August 7, 1947 the Magnolia Furniture Company at Port Wenworth signed a contract with MLA to produce core stock[2] for the latter for $7.00 per thousand. Since their production was faulty, Barnes sent Mangieri and one Sharpe to supervise the operations. (R. 295-296, 323-324, 443.) When some of the MLA core stock customers were dissatisfied with the product they were receiving, Mangieri and a representative of the Magnolia Furniture Company went to a North Carolina chair company to learn the proper way to make core stock (R. 326-327, 611).

From October through December 1947 petitioners "always claimed they were broke and didn't have any money" (R. 456). On December 27, 1947 MLA's bank account was depleted and closed (R. 367, 760). There was a cessation of

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[2] Core stock consists of cut lumber to be used in making plywood, table tops and chairs (R. 497).

MLA mill operations a week or so prior to Christmas 1947 (R. 273, 443-444).

On December 26, 1947, Barnes arranged for the formation of a corporation known as the Garden City Core Company (hereinafter called Garden) which never operated (R. 444-445, 558). On the same day Mangieri, by a bill of sale to secure a debt, conveyed to Garden certain MLA equipment suitable for core stock production (R. 621-622, 651-652). On December 27, 1947 Barnes had Garden sell part of this equipment to the Holly Hill Lumber Company (R. 245-246, 449-450, 524-525, 685-686). Barnes ordered Sharpe to sell other Garden equipment, but he was unable to do so (R. 446-447).

After cessation of mill operations, MLA during January 1948 purchased considerable lumber on credit and sold it for cash, sometimes for less than it had agreed to pay. MLA never paid for this lumber. In some transactions, incoming lumber was never unloaded but was shipped out by MLA and invoiced to its customers at an increased footage quantity over that shown in the incoming invoices. (R. 652-653, 659-662, 678-685, 686-687.) After MLA's bank account was closed, Barnes sent his sisters on a number of trips to make cash collections from buyers of carloads of lumber by presentation of the invoices and bills of lading (R. 206-207, 216, 229-231, 235-236, 512-514).

On January 17, 1948, a fire occurred at the MLA office, in which books, records, and furniture were damaged. Two experts testified that the fire was not accidental (R. 404, 406, 409).[3] A few days before the fire, at Barnes' direction, some office furniture, papers, and a safe were moved from the MLA office to the Garden office on the same premises. Several weeks later, the furniture, safe and some MLA records were moved to the home of Barnes Sr. where petitioner Barnes lived. (R. 273-275, 453-454, 475-477, 533.)

During the latter part of January 1948, the Barnes and Mangieri families took a vacation on a two-week automobile trip to Mexico, at a cost of $1000, according to Barnes (R. 548, 550-552, 566-567, 619).

Meanwhile, an involuntary petition in bankruptcy was filed against Mangieri trading as M. L. & A. Timbers on January 23, and he was adjudicated a bankrupt on February 25, 1948. Mangieri's answer, filed on February 26, admitted insolvency. (R. 87-88, 648-650.)

ARGUMENT

The essence of petitioners' argument (Pet. 5-8) is that the evidence was insufficient to sustain their

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[3] On one occasion the Barnes' maid, who had been out of town at the time of the fire, stated that she heard that the mill had burned down, and Mrs. Barnes, Sr. replied, "Yes, they could not continue business out there and they paid a colored man one dollar to burn it down" (R. 477).

convictions. As appears from the Statement, however, there was ample evidence of a common understanding and criminal intent on the part of the two petitioners to fraudulently conceal and transfer MLA assets in contemplation of its bankruptcy, and of numerous overt acts in furtherance of that agreement. The transfer of equipment to Garden and its immediate resale was obviously an attempt by Barnes to obtain for himself assets which should have gone into the bankrupt estate. After MLA was hopelessly insolvent, petitioners continued to buy carloads of lumber on credit with no possibility or intention of paying for them, and to obtain cash for themselves on the resale. The evidence was thus clearly sufficient to support the conviction of both petitioners under Count 1 for conspiracy (Cf. *United States* v. *Licht,* 158 F. 2d 458 (C.A. 2), certiorari denied, 330 U.S. 824; *United States* v. *Shapiro,* 101 F. 2d 375, 377-378 (C.A. 7), certiorari denied, 306 U.S. 657; *Carter* v. *United States,* 19 F. 2d 431, 433-434 (C.A. 8)), and the conviction of Barnes under the substantive counts of which the jury found him guilty (cf. *United States* v. *Olweiss,* 138 F. 2d 798, 799-800 (C.A. 2), motion for leave to file a petition for writ of certiorari nunc pro tunc denied, 321 U.S. 744; *Douchan* v. *United States,* 136 F. 2d 144 (C.A. 6), certiorari denied, 319 U.S. 773; *United States* v. *Knickerbocker Fur Coat Co.,* 66 F. 2d 388 (C.A. 2), certiorari denied *sub. nom. Zuckerkandel* v. *United States,* 290 U.S. 673. There was also

evidence of willful and deliberate destruction of records.[4]

The record does not support petitioners' contention that their convictions are unauthorized because the MLA assets actually belonged to Barnes, who was never adjudicated a bankrupt, and not to Mangieri, who was so adjudicated (Pet. 5-6). This is not a situation where Mangieri had no interest whatever in the business and merely agreed to the use of his name by Barnes.[5] Granted that Barnes had considerable power in the conduct of MLA's business, by his own admission he did not "control the bankrupt" (R. 559). Mangieri signed the affidavit, for the truth of which he vouched at the trial, to the effect that he was the sole owner and operator of MLA. Mangieri invested between $12,000 and $15,000 of his own money in MLA. He ordered lumber, wrote checks, made collections, and gave financial statements to Dunn & Bradstreet (see *supra*, pp. 5-6).[6] It was entirely reasonable for persons dealing with MLA

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[4] Since the sentences imposed on petitioners did not exceed that which lawfully could have been imposed on any one count, the judgment must be sustained if any one count is sufficient. *Abrams* v. *United States*, 250 U.S. 616, 619; *Powers* v. *United States*, 223 U.S. 303, 312.

[5] Compare *United States* v. *Agresti*, 130 F. 2d 152 (C.A. 2).

[6] There was no evidence that Barnes attempted in the bankruptcy proceedings to claim any of the MLA property as his, or asserted that he and not Mangieri was the proper party to be adjudicated as the bankrupt.

and the jury to infer that the business was that of Mangieri.

Neither is there merit to petitioners' contention that, since the transfers of MLA assets occurred prior to the bankruptcy petition, and the jury found both of them not guilty of concealing assets from the trustee, they could not be convicted of concealing and transferring assets under the bankruptcy laws (Pet. 7). The concealment or transfer of assets under 11 U.S.C. [1946 ed.] 52(b)(6) and the concealment or destruction of records under 52(b)(7) could occur prior to the bankruptcy petition and still be punishable offenses, since these sections expressly use the phrase "in contemplation of a proceeding under this Act." If petitioners' position is that there is an inconsistency in the verdict acquitting them under count 36 while finding them guilty under other counts, it is well settled that consistency in a verdict is not necessary, each count in an indictment being regarded as if it were a separate indictment. *Dunn* v. *United States,* 284 U.S. 390, 393.

CONCLUSION

The case involves no conflict or question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—998800/P.O.1088